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October 13, 2000

Via Facsimile
Mr. Larry Johnson
U.S. EPA Region V
77 W. Jackson Boulevard
Chicago, IL 60604

Re: NL Industries/Taracorp Site De Minimis Settlement

Dear Larry:

Let me provide you some comments on the draft proposed *de minimis* settlement for your consideration in preparation for our meeting on October 16, 2000, at which time we can discuss them in more detail. We have several comments concerning the timing of the settlement; the necessity for a challenge round; the inappropriate application of a multiplier to past costs; the orphan share issue; and the application of the scrap recycling exemption to the *de minimis* parties in this case.

The Timing of the Settlement Proposal

This Group formed in order to negotiate a *de minimis* settlement many years ago and has repeatedly attempted to negotiate a settlement with U.S. EPA for the *de minimis* parties at this Site. The statutory purpose of *de minimis* settlements is to allow parties with a relatively small share an opportunity to avoid transaction costs and pay for their share of site costs based upon estimates early in the process. Section 122(g) of CERCLA begins with the admonition that the United States "shall as promptly as possible reach a final settlement with the potentially responsible party" when that party is *de minimis*. The government's own guidance echoes that statutory directive as a matter of Agency policy. For example, in the guidance document entitled Streamlined Approach for Settlements with De Minimis Waste Contributors under CERCLA Section 122(g)(1)(A) (July 30, 1993), the Agency articulated ways "[t]o encourage more, early, and expedited settlements, ..." The document goes on to suggest ways to streamline the *de*

minimis settlement process, which had been set forth in earlier guidance documents in 1989 and 1992, both of which described their purpose and procedures as intended to allow *de minimis* parties "to resolve their CERCLA liability as completely as possible early in the response process . . . ." Methodology for Early *De Minimis* Waste Contributor Settlements Under CERCLA Section 122 (g)(1)(A) (June 2, 1992), at page 1.

In this case, U.S. EPA has repeatedly rebuffed, ignored, and/or failed to respond to our overtures and proposals. This issue is significant as it reflects a failure by the United States government to follow its own statutory mandate and policy. It is more than an abstract point, however. Rather, it is pertinent to and has implications for each of the points below. Neither the United States nor any other party is in a position to object at this time that there is an urgent need to resolve our alleged liability or finalize a settlement. Nor can any party fairly attempt to impose a more onerous settlement on us due to the passage of time that has resulted from their own failure to act year after year. To the contrary, the statutory framework has changed to our benefit and the United States should have the integrity to accept it.

Challenge Round

Assuming there is to be any settlement, one key process that must be undertaken prior to finalizing the settlement is an opportunity for each *de minimis* party to submit a challenge to the data base numbers applied to it. This is not a case with complex and uncertain issues with respect to a broad range of materials going into a general landfill. Still, there are a small number of parties who believe that the scrap recycling transactions they may have undertaken with the owner of the site in question involved innocuous materials, not lead-containing materials. We have repeatedly raised this issue when we have communicated with U.S. EPA during the last several years and have repeatedly been told that there would be an opportunity for the parties (probably fewer than ten) wishing to make a challenge to submit their arguments for review. The United States has always recognized the position that the recycling of materials that do not contain any hazardous substances should not be counted toward a party's volume. A challenge round is necessary if a settlement is to occur.

The Multiplier/Premium

U.S. EPA's draft settlement proposal incorporates a 20% multiplier on all costs incurred at the Site, using a $30 million figure to represent the share of alleged arrangers. Application of a premium to costs which have already been incurred rather than to an uncertain

estimate of future costs is contrary to agency guidance and practice. For example, the guidance document entitled Streamlined Approach for Settlements with De Minimis Waste Contributors under CERCLA Section 122(g)(1)(A) says, at page 4, that a settlement should "assign an appropriate premium to the baseline future payment amount" (emphasis added). The 1992 document entitled Methodology For Early *De Minimis* Waste Contributor Settlements under CERCLA Section 122(g)(1)(A) states, at page 17, that the settlement "should include a premium payment for future response costs," as well. In this case, the remedy has already been implemented. We understand that all that remains is long-term operation and maintenance ("O & M"). We are not aware of any well-founded reason to expect a determination to be made in the future that this completed remedy had failed and must be replaced with a new remedy. In these circumstances, the possibility of remedy failure is at most a minor abstraction that does not constitute a basis for imposing any premium on the *de minimis* settlers. We would consider discussing a small premium on O & M costs alone. Even such a premium is probably unfounded because O & M cost estimates normally include a large cushion. U.S. EPA should do away with the premium altogether or consider recalculating it using a smaller percentage applied only to future O & M costs.

Orphan Share

The arguments submitted by letter dated September 22, 2000 by Dennis Reis on behalf of the Settling Defendants that the orphan share issue justifies imposition of any premium, much less a higher premium, is totally unfounded. First, the Settling Defendants should not complain at this time, years after they could have settled with our group and other parties, that due to the passage of time some parties may have disappeared or filed bankruptcy. Both they and U.S. EPA made an election not to involve us in this case or settle with us years ago and cannot reasonably argue that we should now bear any additional burden due to their choice. Furthermore, the calculations (better described as estimates) used by the Settling Defendants to approximate a large orphan share are unfounded and obviously designed to over count it in order to shift some of their costs to us.

Any orphan share that may exist does not constitute a sound or acceptable basis for increasing a multiplier in a *de minimis* settlement. The orphan share issue should have been and we assume was part of the Settling Defendants' negotiation with the United States. That is the appropriate mechanism for the Major parties to obtain relief with respect to an alleged orphan share. Using it as a sword against the *de minimis* parties is inappropriate, especially where the Settling Defendants have already obtained the benefit of an orphan share argument in their

settlement with the U.S. EPA. We hereby request that U.S. EPA provide us with information concerning the factoring of the orphan share issue into the settlement with the Settling Defendants.

Scrap Recycling Exemption

We have seen the United States' position with respect to the application of the scrap recycling exemption to this site and reject it for three reasons. First, the equities do not favor the United States' position. When you consider the policy favoring early *de minimis* settlement, the efforts that the De Minimis Group has made for years to engage the United States in concluding a *de minimis* settlement and the complete lack of any explanation or excuse for the inaction by the United States, it is extremely troubling that the United States would now argue that a legislative correction intended to protect recyclers such as those involved at this Site should be read so narrowly as to exclude the protection. The United States had one opportunity after another – not to mention the obligation as an administrative agency – to work with potentially responsible parties to finalize a *de minimis* settlement early on. The United States failed to do so. Similarly, the Settling Defendants could have filed third-party claims against these parties at an early stage of their case but decided not to bring us in or otherwise work with us to conclude settlement in a reasonable time or manner. Neither the United States nor the Settling Defendants can be heard to complain at this time that the legislature has now acted to correct its prior mistake. In sum, there are significant equitable factors that militate against the United States' position.

Second, the position of the United States that its "pending action" against other parties constitutes an opening to force these *de minimis* parties to pay a share is contrary to the purpose of the exemption, plain statements of intent in the legislative history, and common sense. As noted above, the purpose of the scrap recycling exemption is to correct a mistake in the development of Superfund that has resulted in the imposition of liability upon parties the United States Congress never intended to force to pay to clean up Superfund sites. That category of non-liable parties includes these *de minimis* parties. The fact that Congress included a narrowly drawn exclusion in the exemption for those few cases where the United States had a claim pending unfortunately denies the protection to the Settling Defendants. For a court to expand that very narrow exclusion and apply it to other, *de minimis* parties who are not part of the pending action would be directly contrary to the intent of the exemption.

The legislative history is absolutely clear on this point. First, on November 19, 1999, Senator Lincoln explained the intent of the exclusion in such a way that these *de minimis* parties would enjoy the exemption even if they had already been brought into the pending action as third parties:

> Only those lawsuits brought prior to enactment of this legislation directly by the United States government against a person will remain viable. All other lawsuits brought by private parties, or against third-party defendants in lawsuits originally brought by the United States government will no longer proceed under this legislation. This will resolve the inequities suffered by recyclers in a quick, fair, and equitable manner.

145 Cong.Rec. S15028, as quoted in Department of Toxic Substance Control v Interstate Non-Ferrous Corporation, 99 F.Supp.2d 1123,1152 (E.D. Cal. 2000). In addition, Senator Lott stated:

> . . . Congress intends that any third party action or joinder of defendants brought by a private party shall be considered a private party action, regardless of whether or not the original lawsuit was brought by the United States.

145 Cong.Rec. S15048-15050 (November 19, 1999).

Both of these expressed statements of legislative intent squarely support our position that these *de minimis* parties should enjoy the benefits of the scrap recycling exemption.[1] We are aware of no statement in the entire legislative history of the scrap recycling exemption that is contrary to these two explicit statements. The only quote we have seen used to suggest a contrary conclusion is the statement by Senator Daschle long after (January 26, 2000) the exemption was passed by Congress and signed by the President, and it concludes that the issue should be left to the courts rather that explicitly taking a contrary position.

[1] Obviously, we recognize that application of the exemption may require a review of its factual applicability in the circumstances of the Site history and each party's alleged connection to it. Focusing on that set of issues would be far more productive than attempting to impose liability on us contrary to Congressional intent.

Finally, the factual recitation provided by the United States with respect to the status of the pending action in this case is misleading. The United States suggests that the Court's orders in this pending action still explicitly hold open the opportunity for the Settling Defendants to file third-party claims. In contrast, the Court's Case Management Order of 1992 created a three-phase process and explicitly limited the filing of third-party claims to a 90-day window after the first phase concluded and long before the conclusion of the second or third phases. These three phases were "remedy," "liability," and "allocation."

In this case, the court records demonstrate clearly that, as early as 1994, the parties entered into settlement negotiations that dealt with all three phases of the case, namely resolution of liability and the shares of the parties as well as the nature of the remedy. Not only were these *de minimis* parties not brought into the case in a timely manner in order to allow them to participate in discovery or negotiations with respect to liability or allocation, but the Settling Defendants also proceeded for a period of years to negotiate a settlement resolving all three phases of the case - and went on to complete the remedy! While the court may not have explicitly ruled that the remedy phase was completed and that the 90-day period for the addition of third parties had passed, any reasonable interpretation of the record in this case demonstrates that in fact those phases were resolved long ago. Indeed, the decree embodying the settlement between the Settling Defendants and the United States has been lodged with the court for over a year. That document embodies the previously resolved issues with respect to the remedy, liability and allocation. To suggest now, as the United States attempts to do, that the first of three phases in this case has not yet been completed is misleading and specious.

Conclusion

The real problem with this case is that the United States concluded a settlement with the Settling Defendants based upon an assumption that the United States would collect money from *de minimis* parties yet never took reasonable steps to proceed with a *de minimis* settlement in a timely fashion. Now that it is too late for the United States to sue or otherwise attempt to impose liability upon these *de minimis* parties, it nonetheless seeks to protect its bargain with the Settling Defendants by taking the position that they should pursue the *de minimis* parties. For the reasons set forth above, that position is inequitable, contrary to legislative intent, and unfounded in the context of this litigation. The only legitimate inquiry that can be conducted in this case is the factual applicability of the exemption to these individual *de minimis* parties. Only after such an undertaking has been completed, and if it is determined that some parties do

not qualify for the exemption, would it then be reasonable to offer a cash-out settlement for each such party's fair share of costs incurred.

We will meet with you on October 16, 2000 prepared to discuss the details of the draft proposed *de minimis* settlement, but expect the United States and other parties to be prepared to discuss the positions expressed in this letter, as well.

Very truly yours,

MILLER, JOHNSON, SNELL & CUMMISKEY, P.L.C.

By

Dustin P. Ordway

DPO:sjs
cc: Steering Committee
Dennis Reis
Marcus Martin
Steven Willey
Susan Loyd